UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 801

Cases No. 894: PATTINSON
No. 895: PATTINSON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Ms. Deborah Taylor Ashford;

Whereas, at the request of Joy Pattinson, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 29 April and 31 August 1994, 28 February, 31 May and 31 August 1995, the time-limit for the filing of an application to the Tribunal;

Whereas, on 7 August 1995, the Applicant filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 13 October 1995, the Applicant, after making the necessary corrections, filed two applications containing the following pleas requesting the Tribunal, inter alia:

IN CASE NO. 894

"...

2.2 To rescind the decision taken on behalf of the Respondent to withhold the within-grade salary increment that was due to the Applicant on 1 November 1989, communicated to her by memorandum of the Chief of Personnel Administration, UNOG, dated 30 October 1989;

2.3 To order the Respondent to restore to the Applicant the within-grade salary increment that was due to her as of 1 November 1989 with effect from that date, adjust her salary as of that date accordingly, and pay her the salary arrears that thus become due to her;

2.4 To include in the amount of compensation payable to the Applicant in the event that the Respondent decides, in the interest of the United Nations, to pay compensation for the injury sustained in accordance with the option given to him under article 9, paragraph 1, of the Statute, appropriate and adequate compensation for the loss of pension benefits concomitant upon the withholding of an additional within-grade salary increment as of 1 November 1989;

2.5 To order the Respondent to pay to the Applicant appropriate and adequate compensation for the infringement of her rights through flawed procedures, denial of due process and unfair treatment."

IN CASE NO. 895

"...

2.2 To find that the Joint Appeals Board was in error when it ruled that it was not competent to consider the appeal filed by the Applicant on 20 July 1994 against the decision taken on behalf of the Respondent on 11 April 1994 by the Chief of Personnel Administration, UNOG, and that the appeal was not receivable;

2.3 To rescind the aforementioned decision of the Chief of Personnel Administration, UNOG;

2.4 To order the Respondent to grant the Applicant an additional within-grade salary increment as of 1 November 1990, adjust her salary as of that date accordingly, and pay her the salary arrears that thus become due to her;

2.5 To include in the amount of compensation payable to the Applicant in the event that the Respondent decides, in the interest of the United Nations, to pay compensation for the injury sustained in accordance with the option given to him under article 9, paragraph 1, of the Statute, appropriate and adequate compensation for the

loss of pension benefits concomitant upon the denial to her of an additional within-grade salary increment as of 1 November 1990."

Whereas the Respondent filed his answer on 20 March 1996;

Whereas the Applicant filed written observations on 26 April 1996;

Whereas on 28 August 1996, the Applicant submitted further documents;

Whereas the facts in the cases are as follows:

The Applicant entered the service of the United Nations as a clerk on 23 May 1960. She served on a series of short-term appointments, through 12 October 1979, as a clerk, shorthand-typist and secretary in UNOG, UNHCR, UNCTAD, UNICEF and UNDP.

Beginning 1 September 1980 and continuing through 1981, the Applicant served on fixed-term appointments with UNIDO, Geneva, and, thereafter, on short-term appointments, until 1 August 1985, when she was given fixed-term appointments, by the Geneva Staff Coordinating Council, expiring on 31 December 1986. On 1 August 1986, she was appointed to a G-5 level post.

On 1 January 1987, she received a one-year fixed-term appointment with the Geneva Staff Coordinating Council. Her appointment was extended for a further one-year fixed-term period, when she was transferred to the Geneva Branch of the Department for Disarmament Affairs. With effect from 1 January 1988, she was given a two-year fixed-term appointment, through 31 December 1989. The Department for Disarmament Affairs did not recommend an extension of her appointment beyond 31 December 1989.

With effect from 8 January 1990, the Applicant received a fixed-term appointment that was extended for short periods until 1 September 1990, when she received a fixed-term appointment for one year. During the period from January 1990 to August 1991, she served for three months (January-April 1990) as secretary in the

Office of the Coordinator for United Nations Humanitarian and Economic Assistance Programmes, relating to Afghanistan. She was assigned to the Security and Safety Unit, General Services, from September 1990 to January 1991. From January to August 1991, she was temporarily assigned to the Office of the Director-General. Thereafter, she was on sick leave on full pay, from 1 September 1991 to 23 October 1991, on sick leave with half pay from 24 October 1991 to 2 April 1992 and on special leave with half pay from 3 April 1992 to 16 March 1993.

On 29 September 1989, while the Applicant was working as an Assistant to the Director, Department of Disarmament Affairs (DDA), the latter informed the Chief, Personnel Administration Section (PAS), UNOG, that he did not intend to approve the extension of the Applicant's appointment which was due to expire on 31 December 1989, citing as the reason the "deterioration of the standard of service" of the Applicant. On 19 October 1989, the Director, DDA, also recommended to the Chief, PAS, the withholding of the Applicant's within-grade salary increment.

In a reply dated 25 October 1989, the Chief, PAS, requested from the Director, DDA, the special report required by paragraph 16(a) of administrative instruction ST/AI/240/Rev.2 of 28 November 1984, in cases of recommendations for withholding within-grade salary increments. On 30 October 1989, the Chief, PAS, wrote to the Applicant informing her of the Director, DDA's recommendation to withhold her within-grade salary increment. He also advised her that he had requested the Director, DDA, to prepare the special report, required by ST/AI/240/Rev.2, which would be transmitted to the Applicant upon receipt and which she would be entitled to rebut.

On 31 October 1989, the Director, DDA, asked the Chief, PAS, to accept the 29 September 1989 memorandum which provided a "brief description of the reasons requiring action of withholding the within-grade salary increment" as the special report.

On 1 November 1989, the Chief, PAS, advised the Applicant as follows:

> "I am sending you herewith a copy of [the Director/DDA's] memorandum of 31 October 1989 and of the attachment mentioned therein, which constitute the special report required in accordance with administrative instruction ST/AI/240/Rev.2 of 28 November 1984."

On the same date, the Applicant asked that the Personnel Action Form, issued to withhold the within-grade salary increment, be "considered null and void and immediately withdrawn".

On 30 November 1989, the Applicant filed a rebuttal against the special report by the Director, DDA. On 14 December 1990, the Rebuttal Panel recommended that "while professionally maintaining the Director, DDA's decision, [the Applicant] should be granted an additional within-grade salary increment in 1991 if, by that time, in the opinion of her new chief, her performance satisfies staff rule 103.8."

In a cable dated 21 February 1991, the Administrative Officer, DDA, noted that the Under-Secretary-General for Disarmament Affairs had informed the Administrative Office, DDA, that he concurred with the Panel's recommendation and that he had "no views with regard to any future recommendations that might be made by [the Applicant's] new Chief".

On 28 February 1991, the Chief, PAS, transmitted to the Applicant a copy of the Rebuttal Panel's report and the appraisal by the Under-Secretary-General for Disarmament Affairs. The latter stated that "[i]n view of the findings of the appraisal, no further action is being taken in connection with the withholding of your salary increment".

In a report dated 16 March 1991, the Applicant's performance for the period 9 April through 30 November 1990 was evaluated as a "very good performance" by the Chief of the Security and Safety Unit.

On 5 July 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 10 July 1991, the Deputy Chief, Security and Safety Unit, evaluated the Applicant's performance for the period 9 April 1990 to 18 January 1991 as "below standard". No within-grade salary increment was paid, despite the issuance of a Personnel Action Form dated 19 March 1991, stating that the step would be paid with effect from 1 November 1990.

On 16 July 1993, the JAB adopted its report. Its conclusions and recommendations read, in part, as follows:

"Conclusions and Recommendations

...

The Panel, taking into account ... the efforts made by the Administration to find her various assignments after her fixed-term appointment with the Department of Disarmament Affairs expired on 31 December 1989, concludes that the Administration has made a genuine showing to be helpful and to be fair to the Appellant.

While recognizing that there have been procedural irregularities, the Panel is convinced that such irregularities did not change the substance of the administrative decision to withhold the within-grade salary increment. In view of the above, and in view of the fact that the overall treatment of the Appellant has been a fair one, the Panel decides not to make any recommendation in support of the appeal.

The Panel decides to make a general recommendation to the Secretary-General of the United Nations to revise paragraph 16(a) of Administrative Instruction ST/AI/240/Rev.2 and to change the wording of that paragraph - for the reasons specified in paragraphs 29 and 30 of this JAB report - to read as follows:

'(a) there is a recommendation from the department or office to withhold the within-grade salary increment because of unsatisfactory service or conduct. This report must be submitted at least one month before the salary increment is due.'"

On 11 August 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Board's report and noted that it made no recommendation in support of your appeal. Accordingly, he will maintain the contested decision to take no further action on your case.
>
> As regards the Board's general recommendation, contained in paragraph 6 (a) of administrative instruction ST/AI/240/Rev.2 and to change the wording of that paragraph, the Secretary-General will examine the Board's recommendation in order to determine whether a change in the Staff Rules and policies is warranted".

On 7 March 1994, the Applicant requested the Chief, PAS, to grant her the unpaid within-grade salary increment that was due on 1 November 1990.

On 11 April 1994, the Chief, PAS, replied as follows:

> "You will recall that, while you rightly mentioned a recommendation on 14 December 1990 of the rebuttal panel that reviewed your case related to the withholding of your salary increment, we informed you on 28 February 1991 of the decision of the Under-Secretary-General for Disarmament Affairs contained in the fax dated 21 February 1991 from DDA [the Director, DDA's] decision, as also recommended by the rebuttal panel, to withhold the within-grade increment that had been due to you in October 1989.
>
> As to whether or not a within-grade salary increment should have been granted to you a year later was contingent upon a separate assessment of your performance by your new Chief even though the fax dated 21 February 1991 from DDA New York indicated that '[the USG, DDA] has no views with regard to any future recommendations that might be made by [the Applicant's] new Chief'.
>
> In this connexion, a report was established on 10 July 1991 by the Deputy Chief of Security and Safety Unit rating your overall performance as below standard.

Based on the facts, we wish to inform you that the UNOG Administration has consequently considered your case closed."

On 25 April 1994, the Applicant requested the Secretary-General to review the administrative decision cited above. On 21 July 1994, the Applicant lodged an appeal with the JAB against the decision to deny her the within-grade salary increment.

On 11 May 1995, the JAB adopted its report. Its findings, recommendations and conclusions read, in part, as follows:

"The Panel found that, in the present case, the letter was only recalling for the Appellant the decision taken previously concerning the withholding of her within-grade increment, and that it could not be considered as a new administrative decision affecting her rights. The Panel further considered that this issue had already been examined by a previous JAB Panel (in JAB Case No. 223) and that it could not conclude as to its receivability since it would be tantamount to re-opening a case which had led to a confirmative decision of the Panel's conclusion from the Secretary-General. Therefore, the Panel concluded that the appeal was not receivable ratione materiae.

Besides, the Panel found that the Appellant took the opportunity to appeal against the letter of the Chief of PAS dated 11 April 1994, to ascertain whether she would meet the time limits under staff rule 111.2 whereas the decision that she should have appealed against was the decision dated 28 February 1991. In failing to do so, the Appellant's request was time-barred. Therefore, the Panel found that her appeal was not receivable ratione temporis.

Conclusions and Recommendations

The Panel concludes that the letter from the Chief of Personnel Administration Section recalling for the Appellant that her case was closed is not an administrative decision on which an appeal can be based. Therefore, it is outside the scope of the mandate of the JAB and not receivable."

On 30 June 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised her as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has noted the Panel's conclusions that your appeal was not receivable ratione materiae and ratione temporis. The Board bases its conclusions on the finding that the administrative decision being appealed is in fact that [decision] conveyed in the letter of 28 February 1991, which decision was appealed by you and examined by the JAB which issued its report No. 223. The Board also found that the 11 April 1994 letter conveys no new administrative decision but rather recalls that of 28 February 1991. The Secretary-General is in agreement with the Board's findings and conclusions, and accordingly has decided to maintain the contested decision and to take no further action on your case."

On 13 October 1995, the Applicant filed with the Tribunal the two applications referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent disregarded mandatory procedures designed to protect staff interests by issuing the special report on the eve of the date on which the Applicant's salary increment was due, thus denying the Applicant due process.

2. The denial of the Applicant's within-grade salary increment was influenced by bias or other extraneous factors.

Whereas the Respondent's principal contentions are:

1. By informing the Applicant of her right to rebut an appraisal leading to the decision not to grant a within-grade salary increment, and by following a fair and reasonable procedure, the Respondent accorded the Applicant due process.

2. The denial of the Applicant's within-grade salary increment was not influenced by bias, abuse of power or other extraneous factors.

3. A decision not to re-open a time-barred claim is not subject to further appeal.

The Tribunal, having deliberated from 30 October to 21 November 1996, now pronounces the following judgement:

I. As the two applications brought by this Applicant relate to a single set of factual circumstances, the Tribunal joins the applications and addresses the two different claims raised in this single judgement.

II. Both claims stem from a decision by the Respondent to withhold 1989 the Applicant's 1989 within-grade salary increment. The Applicant challenges the procedure by which this decision was made and implemented. She also challenges the subsequent failure of the Respondent to grant her an additional 1990 within-grade salary increment, as recommended by the Rebuttal Panel.

III. ST/AI/240 provides that, when there is a recommendation to withhold the within-grade salary increment because of unsatisfactory service or conduct, a special report "must be submitted before the salary increment is due". The administrative instruction further provides that special reports "must be brief and relate directly to the facts requiring the action" and that they "shall be made by the head of the department or office in the form of a memorandum to the Assistant Secretary-General for Personnel Services".

IV. The Applicant's salary increment was due on 1 November 1989. On 19 October 1989, the Applicant's supervisor, in response to a notification of the upcoming increment, informed the Chief of Personnel Service that he recommended withholding of the increment. His brief memorandum simply stated that the staff member had failed to meet the requirements of staff rule 103.8(a) during the period in question. In a reply of 25 October 1989, the Chief of the Personnel Administration Section requested from the Applicant's supervisor the

special report prescribed by ST/AI/240 for withholding within-grade salary increments.

V. The Applicant was informed on 30 October 1989 of the recommendation to withhold her salary increment, due on 1 November. She was also informed that her supervisor had been requested to prepare a special report, which she would have the opportunity to rebut within one month of receipt. She was further informed that her salary increment would be withheld, as of 1 November. On 31 October 1989, the Applicant's supervisor requested that a memorandum he had prepared one month earlier regarding the Applicant be considered as the special report required. This memorandum concerned the non-extension of the Applicant's appointment and set forth a number of concerns relating to the Applicant's performance.

VI. The Applicant contends that the rules require the preparation of a specific report for the purpose of withholding salary increment. Although the memorandum proffered by the Applicant's supervisor was not prepared for this purpose, the Tribunal finds that in form and content it otherwise fulfils the requirements of ST/AI/240 cited above. It set forth the relevant performance issues supporting the recommendation against a salary increment and the reasons for the decision.

VII. The Applicant also contends that her salary increment should not have been withheld prior to the submission of a special report and the completion of the rebuttal process to which she was entitled. The Tribunal agrees that the actions of the Respondent were such that the Applicant was not given an opportunity to challenge the decision before it was made. However, as the Respondent points out, the decision was reviewed subsequently, and the Applicant could have been granted the increment retroactively.

The Tribunal finds that, in this respect, the Applicant was afforded due process and that the actions of the Respondent were reasonable.

VIII. The Applicant did avail herself of the opportunity to rebut the withholding of her salary increment. The recommendations of the Rebuttal Panel are at issue in her second claim, which was found not to be receivable by the Joint Appeals Board. The Rebuttal Panel recommended that the withholding of the increment should be provisionally maintained and that the Applicant should be granted an additional within-grade salary increment in 1991, if her new supervisor considered her performance satisfactory. The Under-Secretary-General for Disarmament Affairs concurred with the Rebuttal Panel's recommendation to uphold the decision to withhold the salary increment, and the Applicant was so informed on 28 February 1991.

IX. The Applicant contends that, in concurring with the Rebuttal Panel, the Respondent undertook to grant the Applicant an additional within-grade salary increment, conditioned on her performance evaluation by the new supervisor, and that the decision not to grant this increment was only communicated to her in April 1994, following her inquiry. The Respondent contends that his decision was communicated in February 1991, as part of the decision on the Rebuttal Panel's recommendations. Any review at this point would therefore be time-barred, as held by the Joint Appeals Board.

X. In reviewing the Respondent's decision of February 1991, the Tribunal notes the specific reference to future recommendations that might be made by the Applicant's new supervisor and the statement that the Under-Secretary-General "has no views" with regard to this matter. The Tribunal considers this language to mean that the Respondent did not concur with the Rebuttal Panel in its recommendation regarding the additional increment, but only

concurred with the Rebuttal Panel in its recommendation regarding the withholding of the increment.

XI. Arguably, the Respondent subsequently made a decision not to grant the Applicant an additional salary increment. While this decision would therefore be reviewable, it was not a decision relating to the recommendations of the Rebuttal Panel, which are of course non-binding and which were addressed in the Respondent's 1991 communication. The Applicant's claim is based on these recommendations, but as the Tribunal finds that the Respondent did not accept the particular recommendation of the Panel with regard to the additional increment, the claim is without foundation.

XII. For the foregoing reasons, the applications are rejected in their entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary